Date: January 16, 1998

Case No.: 97-STA-9

In the Matter of:

JOSEPH B. BYRD, JR.,
Complainant,

v.

CONSOLIDATED MOTOR FREIGHT,
Respondent

Eugene Felton, Esq.
For Complainant

Deborah Craytor, Esq.
For Respondent

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from claims filed under the Surface Transportation Assistance Act of 1982 (STAA or "the act"), 49 U.S.C. 31105.

A formal hearing was held in this case on August 26-27, 1997 in Atlanta, Georgia. Complainant offered Exhibits RX-1 through RX-9[1] but later withdrew RX-7. Consolidated

[1] The following abbreviations will be used as citations to the record:
CX - Complainant's Exhibits
RX - Respondent's Exhibits
Tr. - Transcript.

Freightways Corporation of Delaware (hereinafter "Respondent" or "CF") offered Exhibits EX-1 through EX-53. All were admitted into evidence.[2] Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Respondent and Complainant stipulated to and I find the following facts:

1. Respondent is a commercial motor carrier subject to the act.

2. Respondent is an employer as defined by the act.

3. Complainant was an employee as defined by the act at all times relevant to this case.

(Tr. 7-8).

ISSUE

Whether Respondent had a legitimate, non-discriminatory reason for any adverse employment action against Complainant, or whether its given reason was merely a pretext, the real reason being that Complainant engaged in protected activity.

FINDINGS OF FACT

A. Testimony of Complainant

Complainant, Joseph Byrd, has been a truck driver with CF starting in the mid-1960s until the time when Respondent fired him (Tr. 20). Complainant began working for Respondent in 1986 (Tr. 21). Complainant had no problems working for Respondent for the first few years (Tr. 22). Complainant received nine safety awards and had earned a tenth, each for driving for a year with no accidents (Tr. 23).

Sleeper runs distort seniority privileges because they get preference for the work available over local drivers (Tr. 25). Sleeper runs consist of two drivers on a continuous trip, in which one driver sleeps on a mattress in the back while the other drives the truck (Tr. 26). The bed constantly shakes and vibrates as if "a 200 pound man were jumping up and down on the bed beside you" (Tr. 27). Complainant has got so tired on these sleeper runs that he has had to pull over and take a nap to avoid falling asleep at the wheel and running off the road (Tr. 27). Complainant's co-driver related that once, when Complainant pulled over for two hours, this was the only sleep he had had in the entire two-day span (Tr. 28). Complainant has driven on six sleeper runs, all lasting approximately

[2] Post-hearing motions to strike were invited but not were received (Tr. 17).

two days, and never got any sleep on the beds (Tr. 29). There were showers at some of the terminals, but Complainant doubted their sanitariness and avoided them (Tr. 30). Ed Gebhart was Complainant's immediate supervisor until May of 1996, at which point Mr. Gebhart was replaced by Tony Smith. Mr. Gebhart treated Complainant fairly and honestly but told Complainant that he had no choice about doing sleeper runs except to quit (Tr. 31). Complainant complained to the Federal Highway Administration in Atlanta in March of 1996 about the runs and to the business agent and president of the local union, but they all told him that Complainant had no choice but to run sleepers or quit his job (Tr. 32).

On one trip from Atlanta to Columbia, South Carolina, Complainant was so tired that he found himself on the left-hand lane of the highway without knowing he got there from the right-hand lane (Tr. 34). After that trip, he told the dispatcher that he was not going to run any more sleeper teams because it was a violation of 49 C.F.R. 392.3 to drive if a driver knows he's going to be so fatigued that he will endanger himself and others on the road (Tr. 35). Sleeper trucks are different from sleeper cabs, which are for lone drivers to pull over and sleep in (Tr. 36). Complainant is on medication for his high blood pressure, of which he first learned from a DOT physical upon first working for Respondent (Tr. 38). Complainant was suffering from hypertension, stress and panic attacks from his harassment by Respondent (Tr. 39). On May 6, 1996, at Jerry Ard's suggestion, Complainant went to Dr. Combs, the company doctor, who measured the bottom number of Complainant's blood pressure at 98 when Complainant first arrived (Tr. 40). After fifteen minutes of relaxation at the doctor's office, the bottom number was 90, which is "borderline high" (Tr. 41). The next day, Complainant went to his personal doctor, Dr. Collier, with whom he had made a previous appointment before visiting Dr. Combs and who measured his blood pressure as low enough to pass the DOT physical requirements, clearing him to return to work the following day (Tr. 42). After Complainant returned from a Memphis drive on May 8, he received a suspension notice from Jerry Ard for absenteeism because Complainant had not returned to work immediately after his visit with Dr. Combs, even though the return-to-work slip from Dr. Combs said to follow up at Dr. Collier's the next day (Tr. 43).

The reason the company gave for firing Complainant was absenteeism, not his refusal to run sleeper teams (Tr. 45). Complainant had two discharge hearings, one on August 19, 1996 in Knoxville, Tennessee, which ended in deadlock. At another hearing, in Deerfield Beach, Florida in September, the committee gave the company the right to fire Complainant (Tr. 46).

Although Complainant received a warning letter for delay of freight, Complainant never received such a letter for delay caused by fatigue (Tr. 49). Complainant was not disciplined for pulling over and taking a nap during a Baton Rouge sleeper run (Tr. 50). In 1995 Complainant complained to the U.S. Department of Transportation (DOT) because of noisy conditions at an overnight stay at a motel in Memphis and received no discipline or retaliation for such complaint (Tr. 51). In a letter, Complainant told CF that he had stopped for a two-hour nap on a Memphis trip to relieve fatigue (Tr. 52, RX-3). Complainant received no warning letter because of that nap (Tr. 54). Complainant missed work from February 5-8 of 1996 because water pipes burst at home (Tr. 54). He took off from February 26-28, claiming fatigue, although he had only worked 45 hours in the

preceding eight days (Tr. 55). Complainant, angry about taking a sleeper run to Carlisle, Pennsylvania on March 25, 1996, complained that it was a violation but was told to take the run or quit (Tr. 60). In his anger, Complainant broke his eyeglasses just before he was to leave on the run (Tr. 61). Complainant claimed that he could not drive the run and hold his eyeglasses together, although he did drive the 75 miles home from the terminal (Tr. 63). Complainant was absent from work for the next week while he got new glasses and allegedly waited for his eyes to adjust to them (Tr. 64). Complainant missed work because he was sick from April 6 to April 10, although there is no record that he visited a doctor during that time (Tr. 65). Complainant claims that he did speak with Dr. Collier over the phone during that period, although Dr. Collier has no record of this, either (Tr. 68). Complainant was off from April 14 to April 24 to have his teeth pulled (Tr. 69).

During a sleeper run on April 26 and 27, Complainant took a two-hour nap, noted this in his log, and was not disciplined for it (Tr. 70). When Complainant went to Dr. Collier's office, his blood pressure first read 160 over 98, and then, after Complainant had been there awhile, the blood pressure was rechecked and read as 145 over 85, which is normal (Tr. 73).

Respondent sent Complainant a warning letter on May 1, because Complainant had not provided a doctor's excuse (Tr. 74). After the May 1 visit to Dr. Collier, Dr. Collier released Complainant to full duty with no restrictions on May 3 (Tr. 75). However, Complainant did not return to work on May 3 or the next few days, and on May 6 Mr. Ard called and asked Complainant to see Dr. Combs (Tr. 76). On the way to see Dr. Combs, Complainant blew out a tire on the highway, which upset him (Tr. 77). Although Dr. Combs' return-to-work slip says that Complainant should follow up with Dr. Collier for a reappointment date, it also says that Complainant's work status is discharged to regular duty as of May 6, 1996 (Tr. 78-9).

Complainant did not return to work until May 8 (Tr. 79), when he made a work run to Memphis, with 7 1/4 hours driving time, one half hour on duty not driving, and off-duty sleep time amounting to 11 3/4 hours (Tr. 81). Complainant drove about eight hours back from Memphis and returned on May 9 at 1:20 p.m, then had eight hours of DOT rest, and would have been rested for the midnight call block (Tr. 82-4). However, Complainant marked himself off the board, although he does not remember calling and saying he was fatigued (Tr. 87).

Complainant did not return to work until June 6 and did not see any doctor during this month (Tr. 89). Complainant claims that he spoke to Dr. Collier on the phone during this period (Tr. 91). Although Complainant told DOT that he went to his doctor immediately upon return from his first sleeper run on October 18 to 19, in fact Complainant did not see Dr. Collier on October 19 (Tr. 92). Complainant did not take any breaks to relieve fatigue on his sleeper runs to Carlisle and Dallas, as reflected in his logs, although Complainant points out that does not mean that he was not fatigued (Tr. 93-4, RX-22, RX-23, RX-24). Without a doctor's excuse, Complainant marked himself off the board from July 5-8 because of a sinus headache even though by that point he had been previously disciplined for absenteeism (Tr. 96). There is no record of Complainant seeing Dr. Collier during this time off (Tr. 100). Complainant missed work from July 21-25 for a dentist visit (Tr. 100). On July 25, Complainant put himself back on the board and half an hour later was called for a dispatch to Carlisle (Tr. 103). At that point, Complainant was rested and ready to drive, but he refused the

Carlisle trip and told the dispatcher that he would no longer take sleeper runs because he was concerned that at some point during the run he would become fatigued from lack of sleep (Tr. 104).

Complainant had received discharge letters on May 8 and May 10 but could continue working pending the resolution of any grievance he filed over the discharges (Tr. 105). However, Complainant stayed off the board from May 9 to June 6 and filed for unemployment compensation for that time. After driving home from his unemployment compensation hearing on July 30, 1996, Complainant took himself off the board for high blood pressure without a doctor's excuse, although he was never asked by CF for such an excuse and did not see a doctor (Tr. 106). From January 15, 1996, to August 6, 1996, Complainant was absent from work for a total of 75 days (Tr. 109). He does not know of any other transport operators in Atlanta who were absent that many days in a seven-month period and was not discharged by Respondent (Tr. 110). Complainant filed a grievance over his discharge letters, which grievance was heard by the Southern Multi-state Grievance Committee (Tr. 111). Complainant argued that the discipline was improper because his absences were caused by high blood pressure and that his refusal to drive sleepers should be excused because he is unable to sleep in them (Tr. 113). The committee upheld the discharge (Tr. 114).

On October 26, 1989, Claimant had received a warning for delay of freight, but it was not because of fatigue or illness (Tr. 115-6).

Complainant did not take breaks on his sleeper runs because he was afraid that he would be disciplined for delaying the freight (Tr. 118). Complainant is not aware of any other employee at CF who has written letters to the Federal Highway Administration, DOT, or any other federal agency regarding sleeper runs (Tr. 123).

From 1986 to 1995, before the sleeper runs were established, Respondent had never had any absenteeism problems with Complainant (Tr. 359).

B. Testimony of James Spainhower

Mr. Spainhower, who works for Ryder Integrated Logistics and New Atlanta Dairies, was employed by Respondent starting on September 13, 1987. Mr. Spainhower made several sleeper runs while working for Respondent (Tr. 126). Mr. Spainhower knows of Complainant but has never ridden a truck with him. Mr. Spainhower resigned from CF on June 6, 1997 under duress because he refused to ride with a driver who had driven in a no-truck lane (Tr. 127). Mr. Spainhower was told by Respondent to drive with this other driver or quit (Tr. 127). Mr. Spainhower had an accident during his first year with CF but after that received nine years of safe driving awards (Tr. 128).

A videotape was then played at the hearing showing Mr. Spainhower being jostled about on a sleeper run mattress (Tr. 129, CX-9). The tape was made by Mr. Spainhower and Robert Slates, who was driving at the time. Mr. Spainhower could not sleep on the mattress, and his total time asleep there was minimal (Tr. 130). Mr. Spainhower has complained to Dean Scruggs and Ed Gebhardt (but not E.A. Smith, who was not around to talk to) about the sleeper runs and filed a grievance with the company and union to have the Health and Safety Committee look into Respondent's operation because the drivers could not sleep in the trucks (Tr. 131-2). The videotape was made during a run to Dallas in May of 1996 (Tr. 136). At the end of that trip Mr. Slates marked

himself off the board as fatigued and then stayed off the following day, still as fatigued (Tr. 136-7, RX-50). Mr. Spainhower was also off duty on May 12 and 13 of 1996. Neither of them received a warning letter for their absence (Tr. 138). If Mr. Spainhower becomes fatigued, he pulls over and takes a break or nap, and he has not received any discipline for so doing (Tr. 139).

C. Testimony of Jimmy Barnett

Mr. Barnett, a transport operator, who has been working for Respondent for nine years (Tr. 143), has been on over ten sleeper-team runs (Tr. 147). Mr. Barnett has complained to Tony Smith, Dean Scruggs, and Ed Gebhardt about the sleeper runs (Tr. 147-8). Mr. Barnett had injured vertebrae in his neck by being bounced around in the sleeper and subsequently got a note from his doctor in March of 1997 saying that he could drive but should not sleep in the sleeper any more because it would seriously aggravate his cervical spinal condition (Tr. 150-1). Mr. Barnett faxed the doctor's note to Kay Upchurch, Respondent's line-haul secretary (Tr. 151). Since then, Mr. Barnett has not received work from Respondent; when Mr. Barnett asked why, the company said that, if he cannot drive sleepers, he cannot drive at all (Tr. 152).

Mr. Barnett's seniority under the collective bargaining agreement does not allow him to accept only single runs (Tr. 154). He was never issued a warning letter or suspension letter or discharged for his doctor's note, but they have not given him work (Tr. 158). On May 11, Mr. Barnett did receive a warning letter for being unavailable for work. It stated that, the next time it happened, he would be disciplined up to and including discharge (Tr. 159). Mr. Barnett has not worked at CF since May 16 and is currently receiving $275 a week in workers' compensation (Tr. 160).

D. Testimony of James Walker

Mr. Walker has been employed by Respondent as a transport operator since 1979 (Tr. 165). He has been on a sleeper team eight to ten times, the most recent one having been the previous week (Tr. 166). He has complained about the sleeper team rest conditions to Andy Threatt and others at CF Motor Freight. Mr. Walker once called in sick, when in fact he was not, in order to avoid making a sleeper run (Tr. 167). He was fired in a letter by Tony Smith later that week for using sickness as a subterfuge, but, through the grievance procedure, Mr. Walker persuaded the committee to throw out the termination as improper. He was supposed to have gotten a warning notice before a termination notice, but he had not (Tr. 169).

On a sleeper run in June of 1996, Mr. Walker got sick on the road and pulled over for a time, recorded this in his log, and was not disciplined for so doing then or at any other time while working for Respondent (Tr. 175-7). However, he has never been told by Respondent orally or in writing that such rest breaks are allowed (Tr. 179).

E. Testimony of Dean Scruggs

Mr. Scruggs is an assistant dispatch operations manager for Respondent (Tr. 181). His job is to oversee the day-to-day dispatch activity at the Atlanta terminal. Mr. Scruggs once issued a warning letter to Complainant for absenteeism (Tr. 182, RX-9). Complainant had refused to make a sleeper run, and Mr. Scruggs told Complainant that he either had to make the run or resign (Tr.

183). Complainant had not claimed any fatigue at that time, at least not as recorded in the driver call block worksheet (Tr. 183-4, RX-7). Complainant reported that he had broken his glasses and was unable to drive (Tr. 184). Mr. Scruggs saw Complainant driving home a couple of hours later, and they did not appear to be broken (Tr. 185). Complainant was absent for seven days, allegedly because of broken eyeglasses (Tr. 186). Mr. Scruggs was suspicious because most eyeglasses can be repaired within 24 hours, and most people have an extra pair of glasses (Tr. 186). At this point, on April 3, Mr. Scruggs issued the warning letter to Complainant (Tr. 187). At this time, Mr. Scruggs had no knowledge that Complainant had complained to DOT regarding Respondent's sleeper operation. Mr. Scruggs dnied Complainant's request for earned time off because he had not performed six consecutive tours of duty (Tr. 187). After this denial, Complainant called in sick, claiming high blood pressure (Tr. 188). When Complainant called, he was not refusing a dispatch but rather calling in anticipation of a dispatch (Tr. 188-9). At this time, Mr. Scruggs still had no knowledge that Complainant had complained to anyone about the sleeper runs (Tr. 189).

When Complainant first told Mr. Scruggs that his glasses were broken, Mr. Scruggs believed him but became suspicious later because Complainant had told him that his brother was going to come drive Complainant home, which did not happen (Tr. 192). Other drivers have made complaints about sleeper teams before (Tr. 193). Complainant's claim of high blood pressure was his only such claim to Mr. Scruggs, and Mr. Scruggs had no reason to disbelieve him at the time (Tr. 194). Mr. Scruggs has ridden a sleeper truck and found it to ride rough, like all trucks (Tr. 194). Mr. Scruggs understood that, when he got fatigued on a sleeper run, he would stop to rest. Although his employer never told him this, he believed it to be common knowledge (Tr. 195). The sleeper runs that Mr. Scruggs has done were not for CF (Tr. 195).

F. Testimony of Robert Ard

Mr. Ard is a group operations manager for Respondent and, as such, is responsible for the entire Atlanta terminal (Tr. 196). Mr. Ard issued a final warning letter to Complainant on May 1, 1996, because Complainant had been denied earned time off and then subsequently went on the sick board, claiming high blood pressure (Tr. 197, RX-13). Complainant had called Mr. Ard's secretary and told her that he was going to the doctor and would call him after he went. However, Complainant never called or faxed a message that day (Tr. 198). On May 8 the terminal subsequently received on May 8 an excuse from Dr. Collier, indicating high blood pressure on May 1 (Tr. 198, RX-49 at 91). The note from Dr. Collier released Complainant to work on May 3, but Complainant did not return on May 3, 4, or 5 (Tr. 199). Mr. Ard spoke to Complainant on May 6 and asked him to see the company doctor, Dr. Combs, and then to come see Mr. Ard (Tr. 200). After the visit to Dr. Combs and a blood pressure reading of 148 over 90, Dr. Combs released Complainant to full duty on May 6 (Tr. 201, RX-15). Complainant did not go see Mr. Ard that day or remove himself from the sick board, nor did he return to work on May 7 (Tr. 201-2). On May 8 Mr. Ard issued Complainant a discharge letter, not knowing that Complainant had gone back to see Dr. Collier on May 7 (Tr. 203).

That day, Complainant made a lay-down run to Memphis with an overnight rest and returned the next day. On May 9 Complainant claimed fatigue; so, Respondent gave him eight more hours' rest (Tr. 203-4). At that point Complainant was supposed to put himself back on the board, but he

did not. This seemed unreasonable to Mr. Ard after Complainant's two eight-hour rest periods, and especially in light of taking the previous week off. Complainant was issued a termination letter for absenteeism (Tr. 204, RX-20). Complainant was advised that he could keep working until his grievance was heard, but Complainant did not return to work until June 6, with no doctor's excuse or other support to explain the absence (Tr. 205-6). On July 25, Complainant told Mr. Ard that he would never make another sleeper run and did not say that he was tired at that time (Tr. 206-7). At this point Complainant had been absent 69 days in approximately six months. At the time when Mr. Ard issued discipline to Complainant for absenteeism, Mr. Ard was not aware that Complainant had made any complaint to DOT, and the decision to terminate Mr. Byrd was not prompted in any way by information that he had complained to any government agency about Respondent's sleeper-run operation (Tr. 207, 209). Mr. Ard is not aware of any other transport operator in Atlanta who was absent as much as Mr. Byrd (Tr. 208). Mr. Ard would have terminated Complainant for refusing to ever take sleeper runs again even if his earlier absences for alleged blood pressure problems had not occurred (Tr. 208).

Some drivers have complained that they cannot sleep and rest while on sleeper runs (Tr. 209). Mr. Ard does not normally get involved in disciplining employees (Tr. 211). Mr. Ard did not talk to Ed Gebhardt, Complainant's supervisor, before firing Complainant (Tr. 213). Mr. Ard did not take Complainant's safety record into consideration when deciding to fire him (Tr. 214). Mr. Ard never personally spoke with Dr. Combs but relied on his receipt (Tr. 215). It did not matter to Mr. Ard that the receipt said, "follow up with Dr. Collier," since he did not take it to be relevant (Tr. 216, CX-6). Mr. Ard did not look at any other medical records of Complainant before firing him (Tr. 217). If Complainant told Mr. Ard that he was likely to become fatigued on a sleeper run, it would have some bearing on whether he would be placed on a such a run, but the total record would need to be examined (Tr. 218). On July 25, 1996, Mr. Ard became aware of Complainant's complaints to several government agencies (Tr. 222). At this time Mr. Ard had already issued a final warning letter, an intent to suspend letter, and two discharge letters to Complainant for excessive absenteeism (Tr. 224). Mr. Ard stated that, if Complainant could not sleep on a sleeper team, in order to be in compliance with section 392.3, he should not be on a sleeper team, but Mr. Ard did not believe that Complainant could not sleep (Tr. 225-6).

G. Testimony of Tony Smith

Mr. Smith is a dispatch operations manager for Respondent and is responsible for the movement of freight in and out of the Atlanta operating group (Tr. 227). He was present when an agreement was reached with Teamsters Local Union Number 278 in which Complainant's two discharge letters were reduced to a suspension and Claimant forfeited back pay and fringe benefits to settle it (Tr. 228). These discharge letters had been for when Complainant had called in with fatigue after the two eight-hour rests (Tr. 228-9). Complainant did not report any fatigue problems on his sleeper runs to Carlisle and Dallas (Tr. 229-30, RX-22, RX-23, RX-24). On July 5, Complainant marked himself off the board, claiming a headache, prior to being available for call (Tr. 230). Complainant returned to work on July 8 without any doctor's excuse for his absence. In response, Mr. Smith issued a discharge letter on July 12 (Tr. 231). On July 13, Complainant took a sleeper run to Carlisle and did not report any fatigue or illness (RX-26). Complainant returned from

a trip on July 21, marked off sick, and called himself back on the board on July 25. On July 25, after being called for a sleeper trip, Complainant said that he refused to take a sleeper trip again (Tr. 232). Mr. Smith told him that the conditions of the job were to work sleeper runs or quit the job (Tr. 233). Complainant did not claim to be currently fatigued at that time (Tr. 234). Complainant did a single run to New Orleans later that day (Tr. 234).

Mr. Smith is not aware of any other transport operator in Atlanta who was absent as much as was Mr. Byrd but who was not discharged (Tr. 235). Mr. Smith discharged Complainant after his refusal to run the sleeper (Tr. 235, RX-33). After Complainant's unemployment compensation hearing, Complainant called the line haul supervisor and said he was unable to work because of high blood pressure, 180 over 120, but provided no corroboration of this (Tr. 237, RX-34). On July 31, Mr. Smith issued a discharge letter because of excessive absenteeism and because Complainant had testified at the unemployment compensation hearing that his blood pressure was controllable (Tr. 238, RX-35). On August 2, Mr. Smith issued a discharge letter because Complainant called in sick from August 2 to August 6 with no doctor's excuse for that time (Tr. 239-40). Drivers are disciplined for marking off sick if it is so frequent that it appears to be a subterfuge for avoiding work and if the driver provides no medical excuse (Tr. 240). A driver will not be disciplined if he is fatigued before dispatch or if he takes a fatigue break enroute (Tr. 242). None of Respondent's discipline of Mr. Byrd was prompted in any way by his disclosure on July 25 that he had complained to government agencies about the sleeper operation (Tr. 242). Mr. Walker was discharged because he had refused to make a sleeper run, claiming dysentary and saying that he was capable of making a single run but not a sleeper run (Tr. 233-4).

For all of the disciplinary actions taken, Mr. Smith checked Complainant's personnel file and medical records but did not ask Complainant for medical documentation (Tr. 248). The discharge of Mr. Walker was overturned by the grievance committee because Mr. Smith had not first issued a warning letter (Tr. 251). Mr. Smith had been informed by Complainant that his blood pressure was up and that he was not safe to be on the road (Tr. 256-7). Mr. Smith spoke to Wilbur Johnson before deciding to discharge Mr. Walker but did not talk to any other supervisors or check Mr. Walker's personnel file or medical file before making the decision to fire him (Tr. 257-8). Complainant was discharged on July 25 for refusing to make a sleeper run, but his previous disciplinary actions had been due to excessive absenteeism (Tr. 260). In the black book, however, Mr. Smith put the reason for the July 25 discharge as excessive absenteeism, which, Mr. Smith argued, is accurate because Complainant's refusal to drive sleeper teams was one of many excessive absences (Tr. 261-2, CX-4).

A letter to Tony Smith from Andy Threatt says, "Now Byrd has been discharged again, twice for absenteeism, and was discharged again yesterday for refusing to go on a sleeper trip." (Tr. 263, CX-3). The letter to Smith also says that Smith should let Mr. Curry, the CEO of Consolidated Freightways, know that Mr. Byrd is one of his worst employees in Atlanta and that he writes letters to everyone (Tr. 264). Mr. Smith thinks that the "writing letters to everyone" statement was a reference to letters to the company and the union, not letters to outside agencies (Tr. 266). An employee recently came to Mr. Smith saying that he had just had heart surgery and could not ride a sleeper team, but Mr. Smith required him to make the sleeper run (Tr. 266-7). Although Mr. Smith has not discharged anyone but Complainant for absenteeism in the past five years, he has discharged

employees in the past five years for other reasons. Those other discharged employees had not made any complaints about sleeper runs (Tr. 268). In his separation notice to Mr. Byrd, Mr. Smith indicated that the reason for discharge was excessive absenteeism. The term "absenteeism" encompassed the refusal-to-make-sleeper-runs incident and all of the other absences (dentist visit, broken eyeglasses, etc.) discussed above (Tr. 269).

H. Testimony of Dr. James M. Combs

Dr. Combs has a B.S. in zoology from the University of Georgia, an M.D. from the Medical College of Georgia, a post-graduate year at Georgia Baptist Medical Center, and 17 years of practice experience, primarily in occupational medicine, in which he is board certified (Tr. 284-5). Dr. Combs is licensed to practice medicine in Georgia and is a member of the American College of Occupational and Environmental Medicine. He has recently attended seminars held by the American College on conducting DOT medical examinations (Tr. 285). He is a medical review officer for DOT for drug testing purposes and has performed about 50-60,000 DOT physical exams over the last seventeen years (Tr. 285). Dr. Combs examined Complainant on May 6, 1996 regarding his blood pressure (Tr. 286). Multiple blood pressure readings of Mr. Byrd were taken in accordance with normal procedure; if the blood pressure is somewhat elevated, the patient relaxes for a few minutes, and a second reading is obtained (Tr. 286). Emotional upset, cigarette smoking, coffee and traffic can all temporarily raise blood pressure (Tr. 287). Blowing out a tire on the way to the office, as Complainant did, would be expected to temporarily elevate blood pressure.

After the examination, Complainant was discharged to his regular duties as of May 6, 1996 (Tr. 288, RX-15). Dr. Combs' recommendation was that Complainant return to work and then see Dr. Collier according to their previously planned appointment, not vice versa (Tr. 288). The release indicated that Complainant's blood pressure was 148 over 90, which is below the 160 over 90 standard stated in DOT regulations (Tr. 288-9). This standard is more rigorous than the AMA standard, in which blood pressure of 180 over 104 or below is adequate for driving commercial vehicles (Tr. 292). Dr. Combs has reviewed Dr. Collier's records, and they do not indicate that Complainant's blood pressure ever consistently exceeded 160 over 90, nor do they indicate that Dr. Collier ever concluded that Complainant was disqualified from driving under the DOT standards (Tr. 292). Dr. Combs does not believe that Complainant was disqualified from driving under the DOT regulations (Tr. 292).

DOT does not have different qualifications for driving a sleeper run and driving a single run; a driver is either qualified for both or for neither (Tr. 292-3). Dr. Combs is not aware of any evidence that sleepers are harmful to drivers' health (Tr. 293). Some drivers complain about the conditions; others, particularly husband-wife or father-son pairs, seem to enjoy it very much. It is normal and healthy for blood pressure to fluctuate (Tr. 294). If a person's pressure was 290 over 160, as Complainant once claimed, he would need immediate IV treatment to avoid organ malfunction; oral medication would not be sufficient (Tr. 295). Complainant was found to be qualified to drive, and his blood pressure was within the acceptable range in each of his biannual DOT physical examinations, specifically in 1990, 1992, 1994, and 1996 (Tr. 296, RX-1). In his last one, on February 1, 1996, he was certified to be able to drive until February 1, 1998. This status would not change unless his diastolic number rose above 110 (Tr. 296).

Dr. Combs has not testified on behalf of Respondent before (Tr. 297). Dr. Combs is self employed, and Respondent is one of his many clients. Dr. Combs will be reimbursed for his expenses for testifying; they have not yet discussed the amount (Tr. 297-8). Dr. Combs has seen several CF drivers with complaints of sleeper injuries, including J.W. Hill (Tr. 299). According to the joint National Conference, normal blood pressure is 130 over 85 (Tr. 300). Stress can affect hypertension as more of a co-factor than a cause and can temporarily raise blood pressure readings (Tr. 301). Lack of sleep, family concerns, job concerns, and financial concerns can cause stress (Tr. 302). Some individuals definitely require more sleep than others; some do fine with five or six hours a night, while others require ten hours a night (Tr. 302-3). CF Motor Freight drivers need to be well rested (Tr. 302). Four to five hours of sleep would be a minimum amount for anyone to be well rested (Tr. 303).

Dr. Collier, not Dr. Combs, is Complainant's treating physician (Tr. 303). The systolic (top) and diastolic (bottom) numbers are equally important blood pressure measures (Tr. 306). Complainant's initial reading was 160 over 98, which is over the DOT recommendation (Tr. 307). On Complainant's March 29 visit, his blood pressure was 153 over 92; the diastolic number was above the DOT guidelines (Tr. 308). On April 3, 1995, his blood pressure was 140 over 100, which is above the recommended allowance, and there was also a 140 over 98 reading which is over the DOT recommended allowance (Tr. 309). Many of these are initial readings, and secondary readings after rest should be examined (Tr. 310). Dr. Combs' assistant had taken an initial blood pressure reading but did not record it (Tr. 311-2). If the first reading is above the DOT guidelines, it is not recorded, and the patient rests so that a second reading can be taken (Tr. 313-4). The intent of employees going to Dr. Combs for these examinations is to obtain an acceptable reading so that they can return to work (Tr. 314).

Dr. Combs usually charges $100 per hour for testifying, including preparation (Tr. 315). He examines several patients a day on referral from Respondent with the goal of getting the employee back to work (Tr. 316-7). Dr. Combs is paid $25 for each of these physicals. He receives thousands of dollars in annual income from Respondent (Tr. 317). There are no reliable symptoms of high blood pressure beyond measuring it; so, a person's saying that he feels that he has high blood pressure is not by itself reliable (Tr. 318). Moderate to mild high blood pressure should have no effect on one's ability to work as a truck driver. Truck drivers with severe high blood pressure are at risk of a heart attack or stroke (Tr. 319). High blood pressure does not render a person tired (Tr. 320).

Dr. Combs was shown the videotape, CX-9, of a man on the sleeper mattress (Tr. 321). Dr. Combs opined that certainly a person would get a better quality of sleep at home in their bed (Tr. 322). If somebody is being jostled on a regular basis, they are going to wake more often, and their quality of sleep is going to be less than in a normal environment (Tr. 322). Some people can sleep better than others in cars, planes, or sleeper runs (Tr. 324).

I. Testimony of Andy Threatt

Mr. Threatt works for Respondent as an employee relations manager and, as such, oversees employee relations, labor relations matters, dealings between employees and management, and presentation of grievance cases at various state and JAC committees (Tr. 325-6). Complainant's grievance was heard in September of 1996 by the Southern Multi-state Grievance Committee, which

is composed of two employer reps, two company employees, and two employees of other local unions (Tr. 326-7). The committee determines whether there is just cause for a discharge and whether all aspects of the contract have been followed (Tr. 327). The governing contract, in article 16, section 2, prohibits an employer from requiring a driver to drive in violation of a government regulation or in dangerous conditions (Tr. 327-8). A driver who claimed that he had been discharged because he refused to drive in violation of a safety regulation would have a claim under this article (Tr. 328). Complainant's presentation to the committee was essentially the same as his presentation at this hearing, except that the committee presentation focused more on the refusal to drive sleeper tractors and not as much on the other absenteeism issues (Tr. 329). Complainant testified and presented evidence to the committee without any limitations on evidence (Tr. 330). The discharge was upheld by the committee, and the grievance for reinstatement was denied (Tr. 331). Respondent had continued to issue discharge letters to Complainant because they would have been time barred under regulation if CF had waited for the grievance procedure to end and the initial discharge had not been upheld (Tr. 331-2). Complainant was terminated for absenteeism. Mr. Threatt is not aware of any other transport operator whose attendance record was as bad as Complainant's but who was not terminated (Tr. 332).

At the grievance-committee hearing, Complainant had testified that on a sleeper trip near Charlotte he found himself in the left lane instead of the right and did not know how (Tr. 335). Driving a truck without rest could create a dangerous condition (Tr. 335). It is common knowledge at CF that some transport operators do not like sleeper teams (Tr. 337). Even though Mr. Threatt represents Respondent, he wants to be fair to the employees so as to foster a harmonious atmosphere (Tr. 340). Mr. Threatt did not look at Complainant's safety record before the grievance-committee hearing (Tr. 340). At that hearing, Mr. Threatt was aware that Complainant alleged that he was suffering from high blood pressure (Tr. 342). Mr. Threatt never asked Complainant for any medical documentation of high blood pressure, nor did anyone else at CF (Tr. 344). Mr. Threatt created the black book, CX-3, and sent it to Tony Smith (Tr. 345). In the black book Mr. Threatt wrote, "Let Mr. Curry know that he is one of our worst employees in Atlanta, and writes letters to everyone." (Tr. 346). By this, Mr. Threatt meant that Complainant wrote letters to CF's headquarters in Menlo Park and to Teamsters Local 278 (Tr. 346).

Mr. Threatt did not learn that Complainant had written any letter to a government agency until later after the present case was filed (Tr. 348). Mr. Threatt has watched the testimony of prior witnesses today, including the other management employees who said that they did not learn of Complainant's writing to government agencies until July 25, 1996 (Tr. 348). Complainant would have been discharged by the committee for absenteeism even if he had not refused to make any more sleeper runs (Tr. 349). Complainant had already been discharged three or four times by the time of his sleeper-run refusal (Tr. 350-1). Mr. Threatt does not recall that any of the 75 days of absence in RX-32 are attributable to Complainant's refusal to make a sleepr run (Tr. 351). Mr. Threatt did not consider Complainant's attendance record prior to October of 1995, because under the contract he is required to go back only nine months in considering an employment record (Tr. 355-6). When the company started doing sleeper runs in October of 1995, the number of grievances filed by employees went up but then declined after some time passed (Tr. 356-7).

DISCUSSION

In order to establish a claim under the STAA, a complainant must prove: 1) that he engaged in protected activity under the STAA; 2) that the employer subjected him to an adverse employment action; 3) that the employer was aware of the protected activity when it took the adverse action; and 4) that the protected activity was the likely reason for the adverse action (i.e., causation). Auman v. Inter Coastal Trucking, 91-STA-32 (Sec'y July 4, 1992); Greathouse v. Greyhound Lines, Inc, 92-STA-18 (Sec'y Dec. 15, 1992). If the complainant establishes this prima facie case by a preponderance of the evidence, then the employer has the burden of articulating a legitimate, nondiscriminatory reason for its action. Once the employer does so, the complainant may prevail only by proving that the nondiscriminatory basis asserted by the employer for its adverse action toward the complainant was merely a pretext for discrimination. Carroll v. J.B. Hunt Transport, 91-STA-17 (Sec'y July 23, 1992).

The Secretary of Labor has made it clear that once the employer produces evidence of a legitimate, nondiscriminatory reason for its action, "the answer to the question whether a prima facie case was presented is no longer useful." Ass't Sec'y & Boyles v. Highway Express, Inc., 94-STA-21 (Sec'y July 13, 1995). Since "this case was fully tried on the merits, it is not necessary to engage in an analysis of the elements of a prima facie case." Id. See also USPS Bd. Of Governors v. Aikens, 460 U.S. 711, 713 (1983); Cook v. Kidimula Int'l, 95-STA-44 (Sec'y June 17, 1996). Because I find that Complainant has not prevailed by a preponderance of the evidence on the ultimate question of liability, in accordance with these decisions, I will not discuss whether Complainant presented a prima facie case.

The legitimate, non-discriminatory reason that Respondent asserts for its discharge of Complainant is excessive absenteeism. This assertion has solid evidentiary support, the strongest being that Complainant had already received three discharge letters and numerous warnings due to absenteeism before the July 25 discharge, none of which warnings was attributable to an open rejection of sleeper-team dispatches (RX-9, 13, 16, 17, 20, 25). The only reason why Complainant was still allowed to work for Respondent after the first discharge letter was that, under the collective bargaining agreement, the grievance procedure had not yet been completed for the prior discharges. The subsequent discharges were necessary for the employer to preserve their timeliness under the contract if these discharges needed to be enforced (Tr. 331-2).

Complainant had been absent for 69 days in the six months prior to his July 25 discharge (Tr. 207-8). There is no evidence of any other transport operators in the Atlanta branch with similar or worse attendance records than that of Complainant, and, thus, Complainant could not show that more favorable treatment was given to a worker in a similar situation who had not engaged in STAA-protected activity (Tr. 110, 208, 235, 332).

Mr. Ard, Mr. Walker, and Mr. Threatt all testified that none of their discharges of Complainant was prompted by complaints made to the DOT and other government agencies (Tr. 207-9, 242, 348). I find this testimony to be credible because they were not aware that Complainant

had made any complaint to any government agency about Respondent's sleeper car operation until July 25. Their testimony as to their unawareness was uncontradicted (Tr. 208, 348).

Complainant argues that Mr. Threatt's letter to Mr. Smith asking Mr. Smith to tell the CEO that Mr. Byrd is "one of our worse (sic) employees in Atlanta, and writes letters to everyone," is evidence that the discharge was motivated by Mr. Threatt's complaints to government agencies (CX-3). However, I believe the testimony of Mr. Threatt and Mr. Smith, when considered along with Complainant's poor attendance record and all of the other evidence, that the "writing letters" reference was to letters to the company and the union, not letters to outside agencies (Tr. 266, 346). In addition, as stated, the letter writer has been shown to have been ignorant of Complainant's complaints to DOT as of the dates of these letters. Thus, Respondent has shown that it did not use absenteeism or refusal to accept sleeper runs as pretexts for unlawful discrimination for the act of writing to government agencies.

Likewise, Complainant has not proven by a preponderance of the evidence that Respondent used absenteeism as a pretext for unlawful discrimination for the act of refusing to ride sleeper cars. Again, this is shown by the numerous discharges and warnings that occurred before Complainant expressed his refusal to make sleeper runs on July 25. Complainant's blood pressure was not above the DOT standards (Tr. 288-9), and his absences contradicted the work releases of his doctors (Tr. 199-203, RX-15, RX-49 at 91). Complainant's avoidance of work for seven days because of broken eyeglasses is another example of absenteeism without a valid excuse (Tr. 183-9).

Even if Complainant had shown that his refusal to accept sleeper runs had been the real reason motivating the discharge, an anticipatory refusal such as this is not protected activity under section 31105(a)(1)(B)(i). In order to be considered protected activity, Complainant must show that, at the time he refused dispatch on a sleeper run, his operation of a commercial motor vehicle would have actually violated 49 C.F.R. 392.3 or that it was "apparent a the start of [the] trip that it would be impossible to complete the trip without violating" section 392.3. Ass't Sec'y & Boyles v. Highway Express, Inc., 94-STA-21 at 13-4 & n.9 (ALJ Mar. 22, 1995), aff'd, 94-STA-21 at 2 (Sec'y July 13, 1995). A good faith belief that a violation of a safety regulation would occur is insufficient to render the refusal to drive protected. Cook v. Kidimula Int'l, 95-STA-44 at 5-6 (ALJ Nov. 21, 1995), aff'd, 95-STA-44 (Sec'y Mar. 12, 1996).

Complainant admits that he was fully rested and ready to drive when he refused the sleeper run on July 25 and that he refused solely because he anticipated that he would become too tired to drive safely at some point during the trip (Tr. 103-4). The decision in Brandt v. United Parcel Service, 95-STA-26 (ALJ June 29, 1995), aff'd, 95-STA-26 (Sec'y Oct. 26, 1995), stands for the principle that this kind of anticipatory refusal is not protected activity. According to the administrative law judge in Brandt, "Sec. 392.3, in the context of an STAA whistleblower proceeding, should not be interpreted to justify a driver's purely subjective feeling of fatigue. Some objective factor must validate the subjective feeling." Id. at 5. The complainant's claim in Brandt was denied because, "It would be impossible for Brandt to prove that the decision he made on Saturday night, not to drive on Sunday night because of expected fatigue, was based on an actual violation of the motor carrier safety regulations." 95-STA-26 at 3 (Sec'y Oct. 26, 1995). Since

Complainant's fatigue on July 25 was merely expected and not actual, I cannot find his refusal to drive to be protected behavior.

None of this is to say that I find sleeper runs to be a safe or prudent practice. The testimony and exhibits, including a videotape showing the jostling which occurs when a driver tries to sleep on the sleeper truck's mattress while the truck is in motion, tend to show that sleeper runs deprive at least some drivers of sleep, arguably making them unsafe drivers (CX-9, Tr. 302-3, 321-24). This is a serious issue which deserves careful examination by the DOT. However, this is not the forum in which to challenge this practice.

Respondent also argues that the Secretary of Labor should defer to the outcome of the arbitration proceedings instituted by Complainant before the Southern Multi-state Grievance Committee, in which the Committee found that Respondent did not discharge Complainant for refusing to run sleeper trips. The regulations implementing the STAA provide that the Secretary of Labor will defer to the outcome of other proceedings instituted by a complainant, such as an arbitration, where (1) those proceedings dealt adequately with all factual issues; (2) they were fair, regular, and free from procedural defects; and (3) their outcome was not repugnant to the purpose and policy of the STAA. 29 C.F.R. Sec. 1978.112 (1997); 53 Fed. Reg. 47676, 47681 (1988); Spielberg Manufacturing Co., 112 N.L.R.B. 1080, 1082 (1955). Although the grievance committee considered whether Complainant's discharge was motivated by either his refusal to make sleeper runs or his absenteeism, it did not receive evidence as to whether the discharge was motivated by Complainant's letter-writing to agencies regarding sleeper runs (RX-41). Because the grievance committee did not hear evidence on all factual issues necessary to a decision on the merits in the instant case, the first Spielberg requirement is not met, and the Secretary of Labor need not defer to the committee's decision, although it is relevant as persuasive evidence. See Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979).

ORDER

It is hereby RECOMMENDED that the claims filed by Joseph B. Byrd, Jr. under the act be DENIED.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/ccw
Newport News, Virginia

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. See 61 Fed. Reg 19978 and 198872 (1966).